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No. 97-1318

In the
Supreme Court of the United States
October Term, 1997

MATTHEW STARK and MARCIA NEELY,
Petitioners,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 640,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY BRIEF 1

A. The questions raised by the petition may be decided as a matter of law based on the record before this Court. 1

B. Respondent's Brief in Opposition misrepresents the record below and rests on alleged facts outside of the record. 2

C. Neither Respondent's policy nor Minnesota statute authorizing ad hoc accommodations prevents Establishment Clause scrutiny. 4

CONCLUSION 5

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 117 S.Ct. 1997, 2016 (1997) 4

Agosto v. INS, 436 U.S. 748, 756 (1978) 1

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) 1

Board of Ed. of Kiryas Joel v. Grumet, 512 U.S. 687, 703 (1994) 4, 5

Board of Education v. Allen, 392 U.S. 236, 242 (1968) 2

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984) 2

Mueller v. Allen, 463 U.S. 388 (1983) 4

Witters v. Wash. Dep t of Servs. For the Blind, 474 U.S. 481 (1986) 4

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1983) 4

Statutes

Minn. Stat. Sec. 126.699 4

PETITIONERS' REPLY BRIEF

Respondent would have this Court believe that the opening and operation the Vesta school and the composition of its student body have nothing to do with religion. Instead, according to Respondent, the modification of the curriculum actually taught to conform to the Brethren's religious beliefs and the complete segregation of the Vesta school along religious lines are simply coincident facts. As the record reflects, however, Respondent contracted with the Brethren to open the Vesta school in a building owned by a Brethren member and operate that school with a curriculum modified to conform to the Brethren's religious objections to technology. Non-Brethren were not solicited to attend the Vesta School and only Brethren children have attended the Vesta school. Such segregation and religiously-modified curriculum are neither constitutional nor sound public policy. Whether the Vesta school was established under a state law or under a school district policy authorizing ad hoc accommodation of religion is constitutionally immaterial, because the principle of accommodation is not one without limits.

A. The questions raised by the petition may be decided as a matter of law based on the record before this Court.

Respondent's claim that the petition is based on disputed findings of fact, which is disfavored by S. Ct. Rule 10, Resp. Br. at 3, is a red herring. The district judge and the three circuit judges who heard this case all agree that summary judgment is appropriate, they simply divide 2-2 as to which side is entitled to summary judgment, once the law is applied to the facts. Accordingly, neither the weight of the evidence nor the credibility of witnesses is at issue. *Agosto v. INS*, 436 U.S. 748, 756 (1978) ("a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Instead, if

certiorari is granted, this Court will have the same concise, written record as the courts below -- affidavits, documents, and deposition testimony -- and no deference will be due the decisions below.[1]

In addition, because the issue of Church and State separation under the Establishment Clause is most often one of degree, *Board of Education v. Allen,* 392 U.S. 236, 242 (1968), an as-applied challenge will inevitably turn upon the facts of the case and an application of the law to the facts, and thereby involve this Court in an examination of the factual record made in the lower courts. Under Respondent's erroneous view of S. Ct. Rule 10, few if any, as-applied Establishment Clause cases would ever be reviewed by this Court.

B. Respondent's Brief in Opposition misrepresents the record below and rests on alleged facts outside of the record.

The Respondent's Brief In Opposition utterly fails, as it must, in its attempt to portray the Vesta school as an ordinary public school that just happens to be attended solely by Brethren children. Respondent attempts to explain the total religious segregation of students in the Vesta school, first by positing that non-Brethren were given a choice to attend the Vesta school;[2] and second, that such parental choice resulted in the coincidence that only the Brethren chose Vesta and everyone else chose Wabasso.[3] Even if

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[1] See also *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 501(1984) (Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.)

[2] The May, 1993 letter soliciting interest in a multi-age classroom to be taught at the Wabasso school, which Respondent claims is the letter that solicited interest in the Vesta school, did not mention the Vesta school. See Pet. at 3 n.1. Thus, quick review of one letter is all that is needed to confirm Respondent's factual misrepresentation.

[3] Appendices J through M from the record below undisputedly establish that the religious segregation which occurred here was the direct result of the school board's actions.

those were the facts, parental choice by non-Brethren residing in Vesta and elsewhere to send their children to a school in Wabasso with an educationally-appropriate curriculum, rather than a school where the curriculum had been modified to conform to the Brethren's religious objections to technology, is insufficient to demonstrate the constitutionality of the Respondent's opening and operation of the Vesta school. See Judge Murphy's dissent. App. A at 23a.

Respondent also addresses the deletion of technology from the curriculum at the Vesta school by making the contradictory arguments that such deletions did not occur, while at the same time asserting that the modifications were compelled by an unspecified ad hoc school district policy. Respondent's assertion that there exists some "voluminous, uncontradicted record of evidence that computer, technology, and audio/visual education is available at the Vesta School," Resp Brf. at 7 n. 7, is false. At the close of discovery when the Vesta School had been in operation for its third year, both of the half-time teachers testified in their depositions that computers and audio/visual devices were not present in the Vesta school, and they were instructed not to teach with such devices. See Appendices H and I. Respondent's assertion could only be true in the hypothetical sense, either by transportation of a student to Wabasso, or by the teacher's request for such devices for her classroom.

Respondent also attempts to rely on photographs attached to the *amicus curiae* brief of the Wabasso Education Association, filed *ex parte* on the eve of the oral argument in the Eighth Circuit, which are obviously not a part of the record of this case, and which counsel for the *amicus* confirms were taken after the close of discovery and after the district court enjoined the operation of the Vesta school. If the pictures actually reflected both the reality of the school and the facts that existed prior to the district court's decision, Respondent's counsel would have surely arranged for such pictures to be taken and placed in the record of the case.[4]

---

[4] The lack of merit in Respondent's position is also found in its resort to another outside-of-record and cryptic factual assertion: "not all current students have requested an exemption from the computer curriculum." Resp. Brf. at 7-8.

C. Neither Respondent's policy nor Minnesota statute authorizing ad hoc accommodations prevents Establishment Clause scrutiny.

For the first time, during this litigation Respondent claims to have been acting pursuant to the following policy:

> "Students whose religious convictions oppose dancing or other activities are to be excused, without prejudice, from these activities in any class, activity, or party. When exclusions are requested in required classes or activities, suitable alternative activities shall be provided."

No reference to the policy appears in any document or record relating to the Vesta school prior to this litigation. Likewise, for the first time during this litigation, Respondent claims to have acted pursuant to Minn. Stat. Sec. 126.699, Pet. App. G, even though the statute was not enacted until May, 1993, and not effective until July 1, 1993.

The principle of religious accommodation, whether or not authorized by a policy or statute, is not one without limits. *Board of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687, 703 (1994). Prior accommodations found acceptable to this Court have allowed religious communities and institutions to pursue their own interest free from governmental regulation. *Id.*, at 705. Accommodations which provide special benefits using religious affiliation as a criteria violate the Establishment Clause. *Id.; Agostini v. Felton,* 117 S.Ct. 1997, 2016 (1997).

Because of the ad hoc nature of the benefit and the total lack of criteria for its application, the policy and the statute relied upon by Respondent do not satisfy the principles laid down by this Court in cases such as *Mueller v. Allen,* 463 U.S. 388 (1983), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1983), and *Witters v. Wash. Dep't of Servs. For the Blind,* 474 U.S. 481 (1986), for neutral programs providing defined benefits to a broad class. The ad hoc nature of the benefit here leaves no assurance that the next similarly situated group will receive the same benefit, i.e. its own school taught according to its religious precepts, and brings this

case under *Kiryas Joel*. Respondent's blind reliance on the policy and statute ignores the limits on accommodation imposed by the Establishment Clause. By singling out one religious group for a special benefit, i.e. the segregation of its students in a special jointly operated school, located in its home town in a building owned by its leader, taught in accordance with its religious precepts, Respondent has endorsed and advanced the beliefs of the Brethren. These special benefits, provided to no one else on this record, exceed the limits of permissible accommodation, and violate the neutrality principle underlying this Court's Establishment Clause jurisprudence.

CONCLUSION

The Eighth Circuit's decision flies in the face of well-settled Establishment Clause jurisprudence by approving the Respondent's establishment of a special school for one religious sect in order to teach a modified curriculum. The Respondent's attempt to divert the Court's attention from these undisputed facts is an insufficient basis to deny the petition. A writ of certiorari should be granted on this important federal question which has been decided below in conflict with relevant decisions of this Court, and so that the conflicting decisions among the circuits may be resolved.

Respectfully submitted,

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APPENDIX H -- EXCERPTS OF THE DEPOSITION OF VESTA SCHOOL TEACHER JENNY EICHTEN, OCTOBER 12, 1995

Q. Was it your understanding at the time of your interview that technology and media would not be taught in the classroom that you were under consideration for?
A. Yes.

***

Q. And were you told by Dr. Bates or anyone else from the school district that you should not use media and technology as part of the curriculum in the Vesta school?
A. That I would not teach it, yes.
Q. And did they say why?
A. It was parent -- or parent request from all of students that they did not wish for their students to participate in computer programming.
Q. Is that the only thing you were told, just about computers? Computers were the only objection?
A. No.
Q. What else?
A. And video tapes would not be used -- they did not want their child to view video tapes.

***

Q. Who did you discuss it with?
A. With Dr. Bates.
Q. And do you recall what he told you about that?
A. That if the student wishes to have computer programming, then transportation will be provided to the Wabasso school building for those students who wish to be involved in that.
Q. But otherwise it would not be provided at the Vesta school, is that right?
A. Correct.
Q. And there would be no use of films or videos at the Vesta school?
A. My job is to educate each child and you can educate a child without using a VCR.

Q. I'm not here to argue with you with that. The question is, did Dr. Bates tell you that you would not be using other things besides computers such as television, VCRs, films?
A. Yes.

***

Q. Calling your attention to page two at the bottom, section 6, the "Use of Technology" of [Pet. App. E], the only thing you had been told -- if I understand your testimony -- prior to starting this school was that those items that are described in section 6 would not be taught; correct?
A. Correct; by me.
Q. And if someone wanted to have them taught, they would have to be bused to the Wabasso building; is that correct?
A. Correct.

***

Q. Do you see the section of subpart five [of Minnesota Rule 3500.1100] that starts, "Media shall be taught in the context of the other required curriculum offerings"?
A. Yes.
Q. And its true, isn't it that media is not being taught in the context of the curriculum in your Vesta classroom?
[Objections]
A. No, it's not.

***

Q. Now, it's true, isn't it, that all of the children who have attended the Vesta building are members of the Brethren?
A. I have not done a religious check, but as far as I know, yes.

***

Q. Do you remember having a discussion with someone identifying themselves as Marcia Neely here maybe more than a year ago calling -- calling you up on the telephone and asking you about what's happening in the Vesta school?
A. Yes.
Q. And did you tell her that all of the children who are attending are Brethren children?
A. As far as my knowledge, they are.
Q. And did you tell her that you had as many students as you could handle at the present time?

A. I can't remember if I told her that.
Q. Well, is that true --
A. Yes.
Q. -- that at that time you had as many children as you could possibly handle?
A. Yes. Yes.
Q. And do you recall telling her that others had been discouraged from attending the Vesta building because you had as many children as you could handle?
A. That's not my decision.
Q. Well, I'm just asking if you may have said that to Marcia Neely in that phone call.
A. I don't remember.
(Appellee's App. below at 45-52)

APPENDIX I -- EXCERPTS OF THE DEPOSITION OF VESTA SCHOOL TEACHER AMY ROHLIK, OCTOBER 12, 1995

Q. And during your part-time work you had learned that there was no media or technology used in the school, is that right?

***

A. Yes.
Q. And how did you become aware that it was not used in the school?
A. Well, when you go to the school you don't see computers there, you don't see VCRs there. And I guess she told me that there was an agreement made before this -- before she even started stating that if the children wanted to use computers, that transportation would be provided to the Wabasso building for that purpose.

***

Q. ... Were you aware that all the children belonged to a religious group called the Brethren?
A. Yes, I assumed they were.
Q. And how did you become aware of that?
A. You can tell by the way they dress the girls, and 18 of the 24 have the last name Paskewitz. So its pretty -- guess its just pretty common knowledge over there.

***

Q. And such items such as: computers, movies, videos, television, radio, audio tapes; those are not used in the Vesta classroom, is that right?
A. That's right.
(Appellee's App. below at 73-75)

APPENDIX J -- EXCERPT OF REPORT OF JUNE, 1993 SCHOOL BOARD MEETING

The Wabasso Board of Education has reached agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall.

The board approved a motion to 'begin pursuing legal avenues' to try and get the school open this fall.

The Brethren, who sent about a dozen representatives to Monday's board meeting, were also asked to look into how much it would cost to get the former Vesta school building - which they own - remodeled according to current state building, health and safety codes.

If it is legally possible to establish this school, it would be operated without the assistance of modern technology such as computers and video and audio equipment. The reasoning behind this is that the Brethren's religious beliefs prohibit them from using such items, and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.

To eliminate the need to remove these children from the public school environment and teach them at home, the Brethren made the proposal for a second school in Vesta last year.

The school would, according to state guidelines, be open to all students. Because it would be operated by District 640, it is a public school, and can not include religious teachings in the curriculum.

Clayton Paskewitz, who did most of the speaking for the Brethren group at Monday's meeting, said there should be no problems getting the school ready by fall, provided that the school district was committed to operating it.

'There was no point fixing it (the school) up until we got a definite yes or no,' he said.

Current enrollment in the school is projected to be 19 students in grades K-6. Because all 19 students would be taught by a single instructor, in one classroom, it is a similar

arrangement to the 'multi-age' classroom which is being considered for the Wabasso school this fall.

'It's just a matter of getting things worked out,' said board member Gordon Alexander, Vesta.

Board member Tom Franta wanted to know if the Vesta school was a one-year trial proposal.

'We would want a two-or three-year trial period,' Bates said.

'That's the way it should be for any new program,' board member Judy Dahms added.

'As far as dropping the program, unless it just doesn't go... you don't want to do that,' Alexander said.

'We would like to set it up for as long a time as possible,' Paskewitz pointed out. 'We don't see any big problems coming up...we're just asking for as simple a program as possible.'

The board agreed to proceed with the proposal, providing all the legal details could be worked out. A limit of $5,000 on the building remodeling was set; if cost estimates are projected to be higher than that, it will have to be brought back to the board for further consideration."
(Appellee's App. below at 42-43)

APPENDIX K – LETTER DATED JUNE 1, 1993

June 1, 1993

Dr. George W. Bates, Superintendent
Wabasso High School
Wabasso, Minnesota 56293

Dear Dr. Bates:

Thank you for your letter of May 27, 1993.

Following is a list of pupils from Vesta that are planning to attend the Vesta Public School. Two of our children have moved, bringing the total down to 19.

GRADE	PUPIL	FATHER
K	Karla Paskewitz	Tom Paskewitz
K	Connie Paskewitz	Ron Paskewitz
K	Ken Paskewitz	Herb Paskewitz
1	Kim Paskewitz	Randy Paskewitz
1	Jay Benson	Bruce Benson
2	Tricia Paskewitz	Clayton Paskewitz
2	Chuck Paskewitz	Herb Paskewitz
2	Stuart Paskewitz	Jeff Paskewitz
2	Ryan Paskewitz	Randy Paskewitz
3	Ben Paskewitz	Jeff Paskewitz
3	Sandra Benson	Bruce Benson
3	Roy Paskewitz	Tom Paskewitz
4	Lisa Benson	Bruce Benson
4	Jill Paskewitz	Herb Paskewitz
5	Eddie Paskewitz	Dale Paskewitz
5	Michelle Paskewitz	Jeff Paskewitz
5	Brad Paskewitz	Tom Paskewitz
6	Janella Paskewitz	Clayton Paskewitz
6	Daryl Paskewitz	Herb Paskewitz

Very Respectfully Yours,
(signed)
Lloyd R. Paskewitz

(Appellee's App. below at 41)

APPENDIX L -- EXCERPT OF REPORT OF SCHOOL BOARD MEETING, AUGUST, 1993

Though a few minor language details have yet to be finalized, the Wabasso Board of Education gave its approval Tuesday night to a proposed contract with Lloyd Paskewitz and The Brethren for operation of the Vesta elementary school.

A group of about 35 Brethren members, plus school insurance agents Darrell Baune and Lauree Price, were at the board meeting to discuss concerns with the contract.

***

School board member Judy Dahms asked that the contract include some mention of the school district's hot lunch program, despite the fact that the Brethren children at the school would be taking all of their meals at home.

"What if some kids enroll who are not Brethren?" Dahms asked.

Superintendent George Bates said that the intention was to have Don's Cafe in Vesta cater the meals for those children and deliver them to the school.

"I don't see it as a problem," he said.

"I don't either... I just think it should be addressed," Dahms said.

Because of the enrollment numbers from among The Brethren for the upcoming school year, Bates did not expect this issue to come up, at least until 1994.

"There are going to be 19 students (in grades K-6)," Bates said. "That's the maximum number we can have with just one teacher."

Dahms said she had received several phone calls from parents concerned that the Vesta school would include religious teachings in its curriculum.

"The perception is that this is going to be a parochial school," concurred board chair, Leon Plaetz.

***

Provisions were also made in the contract making the Vesta school a limited-technology school, as per Brethren request.

(Appellee's App. below at 54-55)